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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 371

BESSIE LASKY AND JESSE L. LASKY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The findings of fact and opinion of the Tax Court promulgated April 8, 1954 (R. 62–92), are reported at 22 T. C. 13. The order of the Tax Court granting a rehearing (R. 135) and the memorandum orders and decisions of the Tax Court entered June 30, 1955 (R. 138–145), after the rehearing, are not reported. The opinion of the Court of Appeals (R. 476–481) is reported at 235 F. 2d 97.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1956. (R. 482.) The petition for a writ of certiorari, filed on August 31, 1956, was granted on

November 5, 1956. (R. 486.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, in the circumstances of this case, the Tax Court lacked jurisdiction to vacate its decisions and grant taxpayers a rehearing after the decisions had become final under the mandate of Sections 1140 and 1142 of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Sections 272 (a) (1), (b) and (h), 273 (e), 277, 322 (c), 1100, 1113, 1117 (a), (b) and (c), 1140 (a), (b), (c), (d) and (e), and 1142 of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 47–54.

STATEMENT

The Court of Appeals granted the Commissioner's motion to dismiss for lack of jurisdiction taxpayers' petitions for review on the ground that the petitions for review were not filed within three months after the decisions of the Tax Court were rendered and therefore, by virtue of Sections 1140 and 1142 of the Internal Revenue Code of 1939,[1] the Tax Court's decisions had become final. (R. 461–473, 476–477, 481.) The facts are not in dispute.

On April 8, 1954, the Tax Court promulgated its findings of fact and opinion in these consolidated cases (R. 62–92). The Tax Court ruled that a cash payment received by taxpayer Jesse L. Lasky in the

[1] References to "Internal Revenue Code" or "Code" are, unless otherwise indicated, to the Internal Revenue Code of 1939.

amount of accumulated shares of film rentals was taxable as ordinary income and not capital gain. The opinion concluded with the following words (R. 92): "The respondent's determination is sustained. Decisions will be entered for the respondent." On April 8, 1954, the Tax Court rendered its decision in each case, deciding in the case of taxpayer Bessie Lasky that there is a deficiency in income tax for 1943 in the amount of $224,722.55, and in the case of taxpayer Jesse L. Lasky, a deficiency of $224,515.14. (R. 92–93.) A copy of each of these decisions was served by the Clerk of the Tax Court on April 9, 1954, by registered mail on Mr. Herschel B. Green, the first attorney of record for the taxpayers in the Tax Court proceeding. (R. 92–93, 105, 128.) No petition for review of these decisions in the Court of Appeals was filed within three months after the decisions were rendered.

Up to this point taxpayers had been represented in the Tax Court by Messrs. Herschel B. Green and Loyd Wright of Wright, Wright, Green and Wright, and Mr. Harrison Harkins. (R. 62.) However, on or about August 24, 1954, more than three months after the Tax Court rendered its decisions, the present counsel for taxpayers filed with the Tax Court a motion for leave to file a motion to vacate its decisions out of time. (R. 93–94.) Such leave was granted, and on August 24, 1954, taxpayers moved to vacate the decisions of April 8, 1954. (R. 93–94.) The following appears from the four affidavits (R. 95) filed in support of this motion:

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Shortly after April 8, 1954, there were received at the offices of Wright, Wright, Green, and Wright the findings of fact and opinion of the Tax Court in these cases, and on April 14, 1954, a conference was held at those offices attended by taxpayer Jesse Lasky, his secretary, Mr. Rogers, and his attorneys, Mr. Harkins, Judge Milliken, Mr. Wright and Mr. Green (R. 95–96, 101), at which the findings of fact and opinion of the Tax Court were discussed, including such matters as the possibility of reversal on appeal and of compromise (R. 95–96, 99, 101–102, 103–104). Mr. Lasky was told in the course of this conference that the Tax Court decisions in these cases would be received separately from the findings and opinion and he would have three months after the date the decisions were entered within which to appeal. (R. 96, 99, 102, 104.) Mr. Green promised to notify Mr. Lasky on the receipt of the decisions. (R. 102.)

What occurred subsequently is stated in Mr. Green's affidavit as follows (R. 102–103):

> Thereafter, Affiant talked with Mr. Lasky, or his secretary, on two or three occasions, when Affiant was asked if the Decisions had been received, and Affiant informed him on each occasion that they had not. During one or two telephone conversations with Mr. Harkins, we made mention of the fact that the Decisions had not been received and that Affiant was keeping a constant lookout for the receipt [*sic*] of these Decisions, having in mind the ninety-day appeal period above referred to.
>
> On or about July 26, 1954, Mr. Harkins informed Affiant that he had received word from

> the desk of the Tax Clerk that the Decisions had been entered in the two cases on April 8, 1954, and that copies thereof had been mailed to us. Affiant thereupon made an immediate search of the Lasky files in his office, and at that time and for the first time discovered copies of the two Decisions. They were on letter-size paper and had been permanently placed in one of the Lasky files on the correspondence side of the file rather than the legal side. Affiant thereupon, on that same day, telephoned Mr. Lasky and informed him that in going through his files Affiant had found the two Decision[s] and *they* they [*sic*] were dated April 8, 1954.

Mr. Harkins stated that under date of July 20, 1954 (R. 104), he wrote the Clerk of the Tax Court inquiring about the status of the proceedings and (R. 105)—

> That on July 26, 1954, your affiant received a letter from the Clerk of the Court, dated July 23, 1954, informing him that the decisions had been entered and had been served April 9, 1954, upon the first counsel of record in the proceedings, Herschel B. Green, Esq., 111 West Seventh Street, Los Angeles 14, California;

Taxpayers' motion to vacate the decisions was heard on September 14, and 16, 1954. (R. 106–133.) At the hearing the following colloquy between court (Judge Harron) and counsel for taxpayers occurred (R. 125–128):

> The COURT. * * *
>
> I wonder, Mr. Ash, if any explanation has been given to you about why Mr. Harkins, for example, waited so long to ask Mr. Mersch

[Clerk of the Tax Court] about the entry of the decisions. As you all know, decisions to be entered for Petitioner and Respondent, even if you had a complicated order to write, would not take more than a half hour to have drafted, typed, and signed. * * *

* * * * *

Mr. ASH. The only explanation I have is—first of all, I will preface it by saying that any of us who do tax work would certainly take the position that Your Honor is taking, because you recognize that the decision would be simultaneous practically with the findings of fact and opinion except in some unusual situations like you mentioned. The only possible explanation is that, of course, Harkins did repeatedly ask Mr. Green if the decisions had come down and was assured that they had not.

As I understand it, for some reasons the Tax Court sent copies of the findings of fact and opinion to each of the counsel of record but, of course, following the established practice that we all know, the decisions went only to Mr. Green.

The COURT. That still does not give me an answer to the question.

Mr. ASH. I do not know the answer.

* * * * *

Mr. ASH. I cannot understand it and I was astonished as could be when I first heard of this thing, which was just shortly before Mr. Heubusch of our office came down and looked through the file and said there is not a thing in the file since the entry of decisions, no motions or anything, and we just could not believe that that could happen, but it did.

> The COURT. The Calendar Section tells me that the decisions went by registered mail April 9. I guess they went by ordinary mail, not airmail, so it probably reached Los Angeles a week later.

The Commissioner, though expressing regret that the situation had arisen, repeatedly made clear his objection to the granting of the taxpayers' motion to vacate on the ground that the Tax Court was without jurisdiction in the premises. (R. 112–113, 120–122, 129.)

At the hearing of September 14 and 16, 1954 (R. 106–133), no suggestion was made on taxpayers' behalf that a rehearing was desired for the purpose of offering additional evidence on the merits. Nevertheless, subsequently on or about October 11, 1954, taxpayers moved for leave to file an amendment to their motion to vacate the decisions, stating (R. 133) "The purpose of the motion to vacate the decisions is to obtain a rehearing of the case on its merits." Such leave was granted, and the pending motion to vacate the decisions was amended by the addition of the italicized words (R. 134):

> Come now the above-named petitioners by their attorney, Robert Ash, and move the Court vacate the decisions entered herein on April 8, 1954, *for the purpose of granting petitioners a rehearing of the case on its merits.*
>
> The statement of facts and supporting affidavits in support of this motion are incorporated herein by reference. [Italics supplied.]

The statement of facts, which taxpayers filed in support of their amended motion on October 11, 1954

(R. 4), suggested that the court should exercise its discretion and grant the motion to vacate the decisions and order a rehearing because the decisions which were entered for respondent on April 8, 1954, did not come to the attention of taxpayers until more than three months had elapsed (R. 484–485). The statement alleges that copies of the decisions which were mailed to taxpayers' counsel did not actually come to counsel's attention upon their receipt as they were inadvertently misfiled and that consequently, through mistake of fact, counsel advised taxpayers and others making inquiry on their behalf that the decisions had not been received.

The statement then continues (R. 485–486):

> (5) Because petitioners had no knowledge that the decisions had been entered on April 8, 1954, and because their counsel advised them affirmatively upon inquiry that the decisions had not been entered, through no fault or negligence of the petitioners they did not file this motion to vacate the decisions within the time allowed by Rule 19 (e) of the rules of this Court.
>
> (6) In view of the foregoing, good cause exists which justifies the Court in vacating the decisions heretofore entered on April 8, 1954, for the purpose of granting petitioner a rehearing of the case on its merits. At a rehearing of the case the petitioner would present additional evidence which will show that the opinion and decision of the Court is wrong on its merits. The evidence would show:
>
> (a) That the agreement of May 15, 1940, and the supplemental agreement of May 15, 1940,

by which the petitioner sold to Warner Brothers all his right to the Sergeant York Story and Warner Brothers agreed to pay petitioner a part of the gross receipts in varying percentages from the distribution of the photoplay are entirely separate and distinct from the employment contract between petitioner and Warner Brothers dated May 8, 1940.

(b) The evidence would show in detail that a bona fide dispute existed in 1942 between petitioner and Warner Brothers. Additional witnesses would be produced to establish this important fact.

(c) Evidence would be produced to show that the sale by petitioners on December 4, 1942, to United Artists Corporation was a bona fide sale to a third party with no understanding that United Artists Corporation would resell to Warner Brothers. This evidence would show conclusively that United Artists Corporation was not a mere intermediary in the transaction.

(d) The evidence would show in detail the business purpose behind petitioner's sale to United Artists Corporation on December 4, 1942.

(e) Upon receipt of this additional evidence at a rehearing it is petitioner's opinion that the Court will revise its opinion in accordance with the newly-presented facts and hold that the sale by the petitioners of their property rights to United Artists Corporation on December 4, 1942, was a bona fide sale of a capital asset within the provisions of Section 117 of the Internal Revenue Code and that the transaction had been properly reported in their 1942 Federal Income Tax Return. Consequently, the

> decisions on the rehearing would be that there was no deficiency in tax due from the petitioners for the taxable year 1943.

Thereafter, without any further proceedings, by order dated December 13, 1954, Judge Harron granted taxpayers' amended motion and ordered (R. 135)—

> That the decision in each proceeding which was entered on April 8, 1954, be vacated and set aside for the purpose of granting petitioners a further hearing on the merits.

This order of December 13, 1954, recited that it was based on cause shown in the amended motion, lodged October 11, 1954, and in the statement of facts in support thereof (summarized and quoted pp. 7–10, *supra*).

The Acting Chief Counsel, Internal Revenue Service, moved to vacate this order of December 13, 1954, on the ground that the Tax Court's decisions had become final and the court was therefore without power to grant taxpayer's motion. (R. 135–137.) This motion and a motion for review by the entire Tax Court of the order vacating the decisions were denied. (R. 137.)

Pursuant to the order of December 13, 1954, the Tax Court held a further hearing (January 21 and 26, 1955), devoted exclusively to the merits. (R. 300–385.) Testimony of four witnesses was taken, including Mr. Lasky's accountant. Mr. Lasky himself gave additional testimony. (R. 139–140.) The Commissioner once more stated his objection to the new hearing on the ground that the Tax Court was without jurisdiction. (R. 383.)

By orders and decisions entered on June 30, 1955 (R. 138–141, 144–145), the Tax Court stated that it had concluded (R. 138–139)—

> that there existed extraordinary circumstances and good cause for granting extraordinary relief, namely, (1) further hearing on the merits to enable the petitioner to present new and additional evidence; and (2) reconsideration by the Court of the issue presented to determine whether the Court made any erroneous conclusion of fact or law in its original findings of fact and conclusions of law. * * * In order to reconsider the issue in this proceeding on the merits and to receive further and additional evidence, the Court vacated its decision entered on April 8, 1954, received further and additional evidence at a hearing, and reconsidered the issue on the merits.
>
> The petitioner diligently and seasonably filed his motion for rehearing and reconsideration on the merits. This Court is continuously in session; it is not in session for a term or terms. The petitioner's motion was not filed, therefore, after a "term" of this Court had expired during which the original decision was entered.

However, the Tax Court further held on the basis of the original evidence and the additional evidence advanced at the rehearing, that it was not persuaded that it had erred in its original findings of fact and conclusions of law. (R. 139–141.) Finding additional facts based upon the additional evidence introduced at the further hearing (R. 141–144), the Tax Court held that there were deficiencies in the

identical amounts originally determined in the April 8, 1954, decisions (R. 141, 144–145).

From these decisions, entered June 30, 1955, taxpayers filed petitions for review in the court below. (R. 147.) The Court of Appeals granted the Commissioner's motion to dismiss these petitions on the ground that the Tax Court was without jurisdiction to set aside its first decisions, and that the Court of Appeals had no jurisdiction to consider petitions to review the second decisions. (R. 481.)

SUMMARY OF ARGUMENT

1. The Tax Court was without jurisdiction to vacate its decisions and grant taxpayers a rehearing after the decisions had become final under the mandate of Sections 1140 and 1142 of the Internal Revenue Code of 1939. This case does not turn on whether the Tax Court is an "agency" or a "court," for, in either event, Congress possesses the power to limit its jurisdiction. This power Congress has exercised so as to deprive the Tax Court, as well as appellate courts, of all jurisdiction further to consider a case after, under the terms of Section 1140, the Tax Court's decision has become final. The decisions of the Tax Court had become final here upon the expiration of the time allowed for filing a petition for review (Section 1140 (a)): namely, three months after the Tax Court's decisions were rendered (Section 1142).

The importance of the date when a Tax Court decision becomes final is apparent from the entire scheme of the statute, and is important in the structure of the estate and gift taxes as well as the income tax.

This date fixes the time when the Commissioner is at liberty to collect and assess and when the statute of limitations starts running. In litigation affecting the public revenue the need for certainty, finality, and expeditious disposition of tax controversies is especially plain. In order to achieve this result, Congress recognized that rules of law in some instances applicable to court procedure must be changed.

This Court has twice held that, even prior to the expiration of its terms of court, Section 1140 prevents reconsideration of its own decisions in cases coming from the Tax Court (*Helvering* v. *Northern Coal Co.*, 293 U. S. 191; *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225). Numerous decisions of the Courts of Appeals are to the same effect. There can be no question that this congressional directive, which limits the jurisdiction of the reviewing courts in cases arising from the Tax Court, likewise restricts the Tax Court itself.

Congress has allowed taxpayers to choose the forum in which to litigate tax liability, and those who choose the Tax Court obtain certain advantages, but they are also bound by corresponding limitations that apply peculiarly to that tribunal.

2. Whether final Tax Court decisions may be reopened where fraud has influenced the decision certainly need not be decided here for there is no claim of fraud. On the contrary, it is undisputed that the failure by taxpayers to file timely petitions for review was due to no fault of the Tax Court or the Commissioner. Where, as here, the Commissioner or taxpayers have asserted that failure to seek timely

review was due to lack of notice of the Tax Court's decision or because of reliance upon counsel, Section 1140 has properly been held to preclude further review. There are not present here circumstances such as mutual mistake of fact in entering into a stipulation or an alleged attempt on the part of the Commissioner to take advantage of a factual error to which he contributed. Thus, no such extraordinary situation is presented as would warrant the issuance of a writ of error *coram nobis,* even assuming that jurisdiction to issue such a writ is not prohibited by Section 1140. Indeed the circumstances here were such that the decision below may be sustained on the further ground that the Tax Court vacated its original decisions and granted rehearing only for the purpose of extending the time for appeal. Although the Court of Appeals did not base its decision upon the well-settled principle that appellate review will be denied where the rehearing below was granted solely for this purpose, nevertheless the record plainly establishes the applicability of this principle.

ARGUMENT

I

THE TAX COURT WAS WITHOUT JURISDICTION TO VACATE ITS DECISIONS AND GRANT TAXPAYERS A REHEARING AFTER THE DECISIONS HAD BECOME FINAL UNDER THE MANDATE OF SECTIONS 1140 AND 1142 OF THE INTERNAL REVENUE CODE OF 1939

Taxpayers' principal contention is that the Tax Court of the United States is a court, and not an administrative agency, and should therefore have the

power to reopen a case in the same manner and under similar circumstances as a district court would have under Rule 60 (b) of the Federal Rules of Civil Procedure.[2] (Br. 26.) Taxpayers claim that "The problem in this case is a broad one and involves the determination of the status in our judicial system of the Tax Court of the United States." (Br. 10, 15.) It is claimed further that the Court of Appeals' holding, that the Tax Court did not have the power to reopen the case, rested on its conclusion that the Tax Court is an administrative agency. (Br. 16.)

At the outset, it must be stated that the Commissioner did not argue below, nor does he argue here, that the Tax Court is an "administrative agency" and not a court. The status of the Tax Court is, in our view, immaterial to the disposition of this case. The Commissioner consistently maintained before the Tax Court (R. 112, 129, 383) and the Court of Appeals (R. 461, 473) that the Tax Court was deprived of jurisdiction, not because of its status, but because its decisions had become final under Section 1140 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 52–54) (Section 7481 of the 1954 Code). And it was on this jurisdictional ground that the Court of

[2] Taxpayers do not, however, contend that the Tax Court's proceedings are governed by the Federal Rules of Civil Procedure. (Br. 26.) Rule 1 provides:

> *Rule 1* [as amended December 29, 1948]. *Scope of Rules.* These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. * * *

See *Katz* v. *Commissioner*, 188 F. 2d 957, 959 (C. A. 2d).

Appeals dismissed the petitions for review. While the opinion below did characterize the Tax Court as an administrative agency rather than a United States court,[3] the decision below did not rest upon this definition or upon any "status" peculiar to the Tax Court. On the contrary, as the court below recognized (R. 479–480), the result here is governed by Section 1140 of the Code, which this Court has twice held[4] precluded it from reconsidering a case after the Tax Court decision had become final under the terms of Section 1140, and which the Courts of Appeals have also repeatedly decided[5] is binding upon them as well as upon the Tax Court.

We submit that characterization of the status of the Tax Court will not resolve this controversy for, assuming it is to be considered a court[6] Congress has the

[3] The Board of Tax Appeals was created by the Revenue Act of 1924, c. 234, 43 Stat. 253, Section 900, as an "independent agency in the executive branch of the Government." This terminology is incorporated in the 1954 Code, Section 7441. See the Report of the House Ways and Means Committee, H. Rep. No. 2333, 77th Cong., 2d Sess., p. 172 (1942–2 Cum. Bull. 372, 498). For a detailed discussion of the origin and nature of the Board of Tax Appeals, see *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716. See also *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231.

[4] *Helvering* v. *Northern Coal Co.*, 293 U. S. 191, discussed *infra* at p. 28; *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225, discussed *infra* at p. 29.

[5] See cases cited, *infra*, p. 33, fn. 38.

[6] Despite its characterization by Congress as an "independent agency in the executive branch" (footnote 3, *supra*), the Tax Court is clearly not an administrative agency in the conventional sense. In structure and function, as well as in name, it operates as a judicial body. See *Stern* v. *Commissioner*, 215 F. 2d 701, 706

power to limit its jurisdiction,[7] and has exercised this power so as to deprive it, as well as the appellate courts, of all jurisdiction further to consider a case after the Tax Court's decision has become final.[8] This was achieved by a Congressional directive contained in Section 1140 fixing various dates or events upon which every decision of the Tax Court becomes final. Thus, early in the history of this tribunal, this Court, speak-

(C. A. 3); *Integration of the Tax Court into the Federal Judicial System*, 25 Taxes, The Tax Magazine, 445 (1947); Gribbon, *Should the Judicial Character of the Tax Court Be Recognized?* 24 Geo. Washington Law Review 619 (1956).

The Tax Court's proceedings are formal and the rules of evidence are those applicable in the courts of the District of Columbia. Section 1111 of the 1939 Code; Section 7453 of the 1954 Code.

It is believed that the Administrative Procedure Act, c. 324, 60 Stat. 237, does not apply to Tax Court proceedings. See testimony of the Attorney General before the Senate Judiciary Committee when the Act was pending before Congress. Appendix B to S. Rep. No. 752, 79th Cong., 1st Sess., p. 37, *et seq.* (S. Doc. No. 248, 79th Cong., 2d Sess., pp. 223–231, 234). But compare *Lincoln Electric Co.* v. *Commissioner*, 162 F. 2d 379, 382 (C. A. 6th).

Principles of *res judicata* and collateral estoppel are applicable in Tax Court proceedings. *Fairmont Aluminum Co.* v. *Commissioner*, 222 F. 2d 622 (C. A. 4th). See *Commissioner* v. *Sunnen*, 333 U. S. 591. For scope of review of Tax Court decisions see p. 34 *infra*, fn. 44.

[7] *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 329–330; *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 234; *Gwin* v. *United States*, 184 U. S. 669, 675; *Ex parte Robinson*, 19 Wall. 505, 511; *Ex parte McCardle*, 7 Wall. 506, 514; *Levering & Garrigues Co.* v. *Morrin*, 71 F. 2d 284, 287 (C. A. 2); *Cinderella Theater Co.* v. *Sign Writers' Local Union*, 6 F. Supp. 164 (E. D. Mich.); *Southeastern Motor Lines* v. *Hoover Truck Co.*, 34 F. Supp. 390 (M. D. Tenn.).

[8] We discuss, at pages 35–46, *infra*, the question whether jurisdiction exists to reopen final decisions predicated upon fraud or like extraordinary circumstances.

ing of the predecessor of Section 1140, said, in *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716, 726–727:

> By § 1005, the decision of the Board is to become final in respect to all the numerous instances which in the course of the review may naturally end further litigation. In the provisions of these sections, the legislation prescribes minute details for the enforcement of the judgments that are the result of these petitions for review in the several courts vested with jurisdiction over them. The complete purpose of Congress to provide a final adjudication in such proceedings, binding all of the parties, is manifest * * *.

With respect to the case at bar, Congress not only fixed a three-month limitation after which a petition for review by a Court of Appeals might not be filed,[9] but expressly directed that upon the expiration of such period without a petition for review having been filed, the decision of the Tax Court "shall become final."[10] And Section 1140 provides for finality of

[9] Section 1142 of the 1939 Code (Appendix, *infra*, p. 54) (Section 7483 of the 1954 Code) provides that—

> The decision of the Tax Court * * * may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered * * *.

[10] Section 1140 of the 1939 Code (Section 7481 (1) of the 1954 Code), in pertinent part, reads as follows:

> The decision of the Tax Court shall become final—
>
> (a) *Petition for Review Not Filed on Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

Tax Court decisions with regard to every conceivable disposition on review by the appellate courts, as well as where no timely review is perfected.[11]

Thus, whether the Tax Court is to be deemed a court because it performs judicial functions is entirely beside the point, for the question is one of

[11] If a petition for review is filed on time, the finality of the decision is postponed to a later date or event depending on the disposition on review. If the Court of Appeals affirms the Tax Court's decision or dismisses the petition for review, the decision becomes final upon the expiration of the time allowed for filing a petition for certiorari if no such petition is duly filed (Section 1140 (b) (1) of the 1939 Code; Section 7481 (2) (A) of the 1954 Code), or, if duly filed, upon the denial of the petition for certiorari (Section 1140 (b) (2) of the 1939 Code; Section 7481 (2) (B) of the 1954 Code). If certiorari is granted and this Court directs that the decision of the Tax Court be affirmed or the petition for review dismissed, the decision becomes final upon the expiration of thirty days from the date of issuance by this Court of its mandate (Section 1140 (b) (3) of the 1939 Code; Section 7481 (2) (C) of the 1954 Code).

Where the Court of Appeals modifies or reverses the Tax Court's decision, and no petition for certiorari is duly filed, or the petition for certiorari is denied, or the decision of the Court of Appeals has been affirmed by this Court, the decision of the Tax Court rendered upon the Circuit Court's mandate becomes final after thirty days, unless within that period either party moves to correct it, in which event the decision becomes final when so corrected. (Section 1140 (c) (2) of the 1939 Code; Section 7481 (3) (B) of the 1954 Code.) Where the Court of Appeals remands the case to the Tax Court for a rehearing, and no petition for certiorari is duly filed, or the petition for certiorari is denied, or the decision of the Court of Appeals has been affirmed by this Court, the decision of the Tax Court rendered on the rehearing becomes final in the same manner as though there had been no prior decision. (Section 1140 (d) of the 1939 Code; Section 7481 (4) of the 1954 Code.)

If this Court modifies or reverses the Tax Court's decision, the decision rendered in accordance with this Court's mandate be-

interpreting a statute which has reference only to the Tax Court. Of course, the word "final" can have different implications, depending upon the context ~~but~~ its use;[12] but references to practices with respect to district courts are not helpful, for there is no section in Title 28 of the United States Code or in the Federal Rules of Civil Procedure comparable to the finality section of the Internal Revenue Code. Wherever "final" is used with respect to district court judgments, it is by way of comparison with interlocutory judgments or has reference to finality for purposes of appeal. See 28 U. S. C., Sections 1291, 1292; Rule 62 (a) and (c) of the Federal Rules of Civil Procedure. Rule 58 of the Federal Rules does not use the term "final" with respect to entry of judgment; nor, contrary to taxpayers' assertion (Br. 29), does Rule 73 (a) specify that the judgment becomes final thirty days after entry. Rule 73 (a) merely specifies the time allowed to appeal from a judgment of the district court. But there is no Rule which declares district court judgments final after the opportunity to appeal is exhausted or has expired. Although Rule 60 (b) allows a district court to relieve a party from "a final judgment," the notes

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comes final after thirty days, subject to the same correctional provision as in the case of a mandate of a court of appeals. (Section 1140 (c) (1) of the 1939 Code; Section 7481 (3) (A) of the 1954 Code.) If this Court remands the case to the Tax Court for a rehearing, the Tax Court's decision upon the rehearing, as in the case of a rehearing ordered by a court of appeals, becomes final as though there had been no prior decision. (Section 1140 (d) of the 1939 Code; Section 7481 (4) of the 1954 Code.)

[12] See *Brownell* v. *Tom We Shung*, 352 U. S. 180, 184–185; *Heikkila* v. *Barber*, 345 U. S. 229, 233; *Johnson* v. *Towsley*, 13 Wall. 72, 82–83.

of the Advisory Committee point out that "final" was used merely in contrast to 'interlocutory." [13]

It should be observed that Section 1140 in no way curtails the opportunity for a full review of Tax Court decisions by the appellate courts. On the contrary, the section is designed to permit the normal course of review before the decision of the Tax Court is to become final. The section is carefully drafted so that, whether or not the opportunity for full review is used, an identifiable date is ultimately reached when the decision does become final. The date of finality, falling as it does only after the opportunity for appellate review is exhausted or has expired, means, of course, that the final decision referred to in Section 1140 embodies more than the degree of finality required for purposes of appellate review.[14] As used in the context of Section 1140, it means that all jurisdiction thereafter to reconsider the case is ended. That is the construction consistently given Section 1140 by this Court [15] and the Courts of Appeals.[16]

[13] Note of Advisory Committee on Rules for Civil Procedure following Rule 60 (Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, pp. 79–83 (June 1946)).

[14] Inquiry is often had as to whether a district court judgment is final for purposes of appeal, and it is in this light that it is used in 28 U. S. C., Section 1291. That obviously is not the meaning of "final" in Section 1140, because, as noted above, Tax Court decisions which are final in the ordinary sense, *i. e.*, definitively resolving the controversy, become "final" within the meaning of Section 1140 only after the opportunity for appellate review is completely exhausted, or has expired unused.

[15] *Helvering* v. *Northern Coal Co.*, 293 U. S. 191, discussed, *infra*, at p. 28; *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225, discussed, *infra*, at p. 29.

[16] See cases cited in fn. 38, p. 33, *infra*.

As the First Circuit has stated in *Sweet* v. *Commissioner,* 120 F. 2d 77, 80–81:

> * * * [Section 1140] certainly is more than a mere cross reference to the provision elsewhere in the statute limiting the time for filing in the circuit court of appeals a petition for review.

The importance of the date when a Tax Court decision becomes final is apparent from the frequent references to finality in the procedure established by Congress for the determination and assessment of taxes. Thus, the Commissioner is required in case of a deficiency to serve a notice of deficiency upon the taxpayer and he cannot make an assessment of the deficiency until the expiration of the ninety days within which the taxpayer may commence a proceeding in the Tax Court "nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final."[17] Moreover, if the Tax Court upon redetermination finds a deficiency, the deficiency shall be assessed and paid upon notice and demand when the decision of the Tax Court "has become final."[18] Thus the Commissioner is prohibited from making an assessment, other than a jeopardy assessment,[19] or from collecting by distraint or by court proceedings, except in accordance with a decision of the Tax Court which "has become final."

[17] Section 272 (a) (1) of the 1939 Code (Appendix, *infra*, pp. 47–48); Section 6213 (a) of the 1954 Code.

[18] Section 272 (b) of the 1939 Code (Appendix, *infra*, p. 48); Section 6215 (a) of the 1954 Code.

[19] Section 273 of the 1939 Code; Section 6861 of the 1954 Code.

Even a jeopardy assessment may not be made after the decision of the Tax Court "has become final." [20]

Furthermore, the running of the statute of limitations on assessment and collection is appropriately suspended during the period in which the Commissioner is forbidden to proceed [21] and until the Tax Court decision becomes final, a like suspension of limitations is explicitly provided in the case of transferee liability.[22] Taxpayers are prohibited from suing for refund of an overpayment determined by the Tax Court until the decision of the Tax Court "has become final." [23] And Section 272 (h) [24] (Appendix, *infra*, p. 48) specifically provides that "the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 1140." The importance of the date when the Tax Court decision becomes final in the scheme of the statute is further apparent from the similar provisions made with respect to the estate tax [25] and the

[20] Section 273 (e) of the 1939 Code (Appendix, *infra*, pp. 48–49); Section 6861 (e) of the 1954 Code.

[21] Section 277 of the 1939 Code (Appendix, *infra*, p. 49); Section 6503 (a) of the 1954 Code.

[22] Section 311 (d) of the 1939 Code; Section 6901 (f) of the 1954 Code.

[23] Section 322 (c) (1) of the 1939 Code (Appendix, *infra*, p. 49); Section 6512 of the 1954 Code. Nor is any bond required to stay assessment or collection during the period of consideration by the Tax Court, nor after the Tax Court decision and during the period before a petition for review with the Court of Appeals is filed, and if no petition for review is filed, until the decision becomes final under Section 1140 (a) of the 1939 Code. (See Section 1145 of the 1939 Code.)

[24] Section 6214 (c) of the 1954 Code.

[25] Internal Revenue Code of 1939, Sections 871 and 875.

gift tax.[26] Thus Section 1140, which specifies the circumstances under which a decision of the Tax Court becomes final, is enmeshed with and derives meaning from other sections which specify the effect of that finality and provides an element essential to the orderly functioning of the entire scheme of the statute.

The reason for such particularity as to the finality of the Tax Court's decisions was set forth in the House and Senate Committee Reports on Section 1005 of the Revenue Act of 1926[27] in substantially identical words (S. Rep. No. 52, 69th Cong., 1st Sess., p. 37 (1939–1 Cum. Bull. (Part 2) 332, 360); H. Rep. No. 1, 69th Cong., 1st Sess., p. 20 (1939–1 Cum. Bull. (Part 2) 315, 329)). The Senate Report reads, in pertinent part:

> *Date on which decision becomes final.*—Section 1005 prescribes the date on which a decision of the Board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run upon the day upon which the Board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. *In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power*

[26] Internal Revenue Code of 1939, Sections 1012 and 1017.

[27] Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9, was the predecessor of and contained practically identical language to that of Section 1140 of the 1939 Code, and Section 7481 of the 1954 Code.

> *of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.* [Italics supplied.]

The Senate Report on the Revenue Act of 1926, *supra,* Section 274 (Internal Revenue Code of 1939, Section 272, Appendix, *infra,* p. 47), with respect to the procedure in the case of deficiencies is quite definite with respect to the desired finality. S. Rep. No. 52, 69th Cong., 1st Sess., p. 26 (1939–1 Cum. Bull. (Part 2) 332, 351). It reads as follows:

> But if he does elect to file a petition with the board his entire tax liability for the year in question (except in case of fraud) is finally and completely settled by the decision of the board when it has become final, whether the decision is by findings of fact and opinion, or by dismissal, as in case of lack of prosecution, insufficiency of evidence to sustain the petition, or on the taxpayer's own motion. The duty of the commissioner to assess the deficiency thus determined is mandatory, and no matter how meritorious a claim for abatement of the assessment or for refund he can not entertain it, nor can suit be maintained against the United States or the collector. *Finality is the end sought to be attained by these provisions of the bill, and the committee is convinced that to allow the reopening of the question of the tax for the year involved either by the taxpayer or by the commissioner (save in the sole case of fraud) would be highly undesirable.* [Italics supplied.]

In conformity with the language of this report, Section 272 (b) of the Code *requires* the Commissioner

to assess the deficiency when the decision of the Tax Court has become final, and Section 322 (c) (Appendix, *infra*, p. 49) forbids him to allow a refund except according to the decision of the Tax Court which has become final.

Taxpayers argue (Br. 29–30) that from an administrative viewpoint it would create no more uncertainty if the Tax Court could reopen than is presented because district courts have this power, and that there is no compelling reason to draw a distinction. The short answer of course is that it is for Congress to determine whether there is reason for appointing a date beyond which Tax Court decisions may not be reconsidered.

In any event, there are sound reasons behind the enactment of Section 1140, which applies only to Tax Court decisions. As was shown *supra*, at p. 23, the statute of limitations on assessments is tolled during a Tax Court proceeding, but commences to run again when the decision becomes final. And it is only after the decision is final that the Commissioner may assess the deficiency.[28] It is important to the timely collection of taxes, therefore, that the Commissioner be able to compute accurately when the statute commences to run again. This problem is not present in district court actions because the tax has already been paid and there is no statute of limitations which is tolled during a suit for refund.

Moreover, when a decision becomes final in favor of the Government, a date certain is provided when the

[28] Section 272 (a) (1) of the 1939 Code (Appendix, *infra*, p. 47); Section 6213 (a) of the 1954 Code.

United States may rely on the right to the deficiency therein determined. This Court has recognized that Congress might substantially alter normal court procedure in the interest of preserving a steady, predictable flow of revenue.[29] In this respect it may well be supposed that Congress anticipated that the bulk of the tax litigation would be handled in the Tax Court, and was thus more concerned with the finality of Tax Court decisions than of district court judgments. Statistics for the last several years indicate that Tax Court cases outnumber district court tax cases 4.2 to 1, and, more important, 17 to 1 in dollar volume.[30]

Thus it is plain that Congress had excellent reasons for declaring that when a decision of the Tax Court becomes final the case cannot thereafter be reconsidered, and in this respect Congress has clearly and unmistakably restricted the Tax Court's jurisdiction.

Accordingly, the Congressional mandate contained in Section 1140, that finality be accorded Tax Court

[29] See *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *Cheatham* v. *United States*, 92 U. S. 85, 89; *State Railroad Tax Cases*, 92 U. S. 575, 613; *Shelton* v. *Platt*, 139 U. S. 591; *Dodge* v. *Osborn*, 240 U. S. 118; *Bailey* v. *George*, 259 U. S. 16; *Graham* v. *Du Pont*, 262 U. S. 234.

[30] The information in the following table is taken from the Annual Reports of the Commissioner of Internal Revenue for the Fiscal Years ended June 30, 1953, pp. 151, 152; 1954, pp. 97, 99; and 1955, pp. 112, 114:

	Number of Cases		Amount	
	Tax Court	District Courts	Tax Court	District Courts
Pending July 1, 1952	10,099	2,247	$1,350,740,325	$62,173,502
Pending July 1, 1953	12,017	2,533	1,612,501,222	76,101,055
Pending July 1, 1954	9,758	2,576	1,709,812,000	115,054,000
Pending July 1, 1955	9,243	2,351	1,892,057,000	117,059,000

decisions, has been recognized and respected by the courts. This Court in *Helvering* v. *Northern Coal Co.*, 293 U. S. 191, 193, held that "the authoritative and explicit requirement of the statute" precluded reconsideration of cases which had attained finality by virtue of Section 1005 (a) (4) of the Revenue Act of 1926, c. 27, 44 Stat. 9.[31] In the *Northern Coal Co.* case this Court had affirmed the Board's decision by an equally divided Court. 290 U. S. 591. Petitions for rehearing were denied and the mandates of the Court issued. After the decisions became final, but during the same term of court,[32] the Commissioner again petitioned for rehearing on the ground that in the meantime the Court had decided the precise question in another case in the Commissioner's favor. In a *per curiam* opinion the Court denied a rehearing because the decisions had become final under the statute. It thus appears from the decision in the *Northern Coal Co.* case that, although the judgments in that case may have been erroneous, and although the taxpayers may have received an immunity from taxation to which they were

[31] Comparable to Section 1140 (b) (3) of the 1939 Code and Section 7481 (2) (C) of the 1954 Code, declaring the decision of the Tax Court final thirty days after issuance of the mandate of the Supreme Court affirming the decision of the Tax Court.

[32] Unless limited by statute, the power of federal courts to reconsider a case during the same term is well recognized. See *Roemer* v. *Simon*, 91 U. S. 149; *Bronson* v. *Schulten*, 104 U. S. 410, 415; *D., L. and W. R. R.* v. *Rellstab*, 276 U. S. 1, 5; *Realty Co.* v. *Montgomery*, 284 U. S. 547, 549; *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238, 244. Title 28 U. S. C. § 452, Act of June 25, 1948, c. 646, 62 Stat. 907, provides, in part, "The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding."

not entitled under the law as established by the Court at the same term, the Court nevertheless could not change the earlier judgments.[33]

If there were any doubt that the holding in the *Northern Coal Co.* case rested on lack of jurisdiction, *R. Simpson & Co.* v. *Commissioner,* 321 U. S. 225, dispelled it completely. There the taxpayer's petition for certiorari had been denied. 317 U. S. 677. After the decision became final,[34] but during the same term of court, a conflict developed, and the taxpayer's motion to file out of time a petition for rehearing[35] was granted. The petition for rehearing was granted, the order denying certiorari was vacated, and certiorari was granted. 319 U. S. 778. The Court asked counsel to discuss its jurisdiction to grant the petition for rehearing "in view of § 1140 of the Internal Revenue Code and *Helvering* v. *Northern Coal Co.,* 293 U. S. 191" (p. 227). After pointing out in its opinion that Section 1140 is designed "to determine definitely the date on which the statute of limitations, suspended during appeal, begins to run again and assessment may be made by the Commissioner" (p. 228), the Court held that (p. 230)—

> * * * when under our rules our denial [of certiorari] has become final, this statute deprives us of jurisdiction over the case.

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[33] See S. Rep. No. 52, 69th Cong., 1st sess., p. 26, quoted, *supra,* at pp. 24–25.

[34] The decision became final under Section 1140 (b) (2) upon the denial of certiorari.

[35] The twenty-five days during which a petition for rehearing as of right might have been filed under the Court's Rule 33 had expired.

> Accordingly the writ of certiorari is dismissed for want of jurisdiction.

The *Simpson* case is therefore direct authority for the Commissioner's position here. Yet taxpayers strive to find some support in the case for the proposition that "final" as used in Section 1140 "must give way to accepted Court practice" (Br. 24), and that, therefore, "the word 'final' does not deprive courts in tax cases of the usual discretionary powers that judicial tribunals possess" (Br. 25–26).[36] This conclusion is not only in error, but is the exact converse of the actual holding.

The Court's attention in the *Simpson* case was focussed on the numerous instances where, after the denial of certiorari, certiorari was later granted on a petition for rehearing filed within the twenty-five days allowed for filing a petition for rehearing as a matter of right. The problem was how the Court acquired jurisdiction to grant the petitions for rehearing in those cases inasmuch as the denial of certiorari in the first instance had the apparent effect of making the Tax Court decision final. The explanation (321 U. S., pp. 228–230) was that a denial of certiorari is "qualified" until the 25-day period allowed for filing a petition for rehearing as of right has expired.

[36] Counsel states (Br. 25, fn. 5) that the Government conceded in the *Simpson* case that a court has inherent power to reconsider a final decision of the Tax Court. But, as the portion of our brief quoted in taxpayers' brief indicates, we merely suggested that the Court's jurisdiction to hear the case might be preserved if denial of certiorari were construed to mean the ultimate action taken by the Court during the same term instead of the action on certiorari in the first instance.

In this respect it is significant that, although both parties agreed that the Court had jurisdiction, the writ of certiorari, already granted, was dismissed for lack of jurisdiction.

Therefore, in cases originating with the Tax Court, denial of certiorari does not become "final" until the 25-day period expires (p. 230).

The eventual refusal to grant the petition for rehearing in the *Simpson* case was not merely "because filed more than 25 days after the denial of the petition", as taxpayers assert. (Br. 25.) Upon the expiration of the twenty-five days, the denial of certiorari, and thus the Tax Court's decision, became final, and it was clearly for this reason that the Court dismissed the writ of certiorari, not as a matter of discretion, but because the Court lacked jurisdiction.[36a]

The holding in *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131, that a bankruptcy court in a reorganization proceeding has power in its sound discretion to reopen an order dismissing the reorganization petition, notwithstanding that the time allowed for appeal from the order has expired, is inapplicable here. The reasoning of this Court (p. 137) shows that the rule would have been different, if the statute there had contained a provision similar to Internal Revenue Code Section 1140, as, indeed, this Court's decisions in the *Northern Coal Co.* and the *Simpson & Co.* cases demonstrate. As the court below noted, the *Simpson* case was decided seven years after the *Wayne Gas* case. (R. 480–481.)

Moreover, the fact that the Tax Court, like the

[36a] See also *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243 (C. A. 1st) holding that, although a petition for rehearing timely filed with the Board operates to postpone the running of the time for filing a petition for court review until the Board has disposed of the petition for rehearing, a petition for rehearing filed after the time prescribed by the Rules of the Board must be acted upon within the three-month period provided for in § 1140 for thereafter the Board is deprived of jurisdiction by that statute.

bankruptcy court in the *Wayne Gas* case, has no "term" and that therefore the Tax Court may not be said to have vacated its decisions "out of term" (R. 139) is, in view of Section 1140, entirely immaterial. In the *Northern Coal Co.* and *Simpson* cases this Court held that Section 1140 deprived it of jurisdiction even within the term.

The *Northern Coal* and *Simpson* decisions show that when a decision of the Tax Court becomes final Section 1140 deprives the Supreme Court of jurisdiction further to consider the case. With all the more reason it would seem that the section constitutes a limitation upon the power of the Tax Court to vacate its own decision after it has become final.[37] It is

[37] Significantly, a majority of the judges of the Tax Court have in the past agreed that "final," as used in Section 1140, deprives the Tax Court of jurisdiction thereafter to reconsider the case. The motion to reopen after the decision became final, in *La Floridienne J. Buttgenbach & Co.* v. *Commissioner*, B. T. A. Docket No. 15480 (not reported), discussed *infra* at p. 39, was reviewed by the Board and denied for lack of jurisdiction. In the memorandum accompanying the order denying the motion in *McCarthy* v. *Commissioner* (Tax Court order not reported; see Seventh Circuit opinion, 139 F. 2d 20, 21), Judge Murdock, the present Chief Judge of the Tax Court, stated that "This Court is without jurisdiction to vacate the decision which has now become final under the statute and to reopen the proceeding." Again in *J. S. Rippel & Co.* v. *Commissioner*, 36 B. T. A. 789, the Board itself held that (p. 790)—

> It is well settled that the Board is a tribunal of limited authority and jurisdiction, and where the statute provides that our decisions shall, under certain circumstances, become final, we have no power to reopen and change them when such finality has taken place.

And in the following cases it was assumed by the Courts of Appeals that the Board, or Tax Court, had denied the motion for want of jurisdiction: *White's Will* v. *Commissioner*, 142 F. 2d 746 (C. A. 3d); *Monjar* v. *Commissioner*, 140 F. 2d 263 (C. A. 2d).

obvious from the detailed nature of Section 1140 (see fn. 11, p. 19, *supra*) that the effect of finality must be the same for each possible situation therein described, and that "final" is meant to apply to the lower courts and the Tax Court in the same manner and with the same force as to the Supreme Court. Therefore, neither the Courts of Appeals nor the Tax Court can reassume jurisdiction once the decision of the Tax Court has become final, and in numerous Courts of Appeals decisions this lack of jurisdiction has been recognized.[38]

The fact that the right to reopen a decision out of time may vary, depending upon whether the action is in the district court or the Tax Court, presents nothing novel to the tax law. Rights far more substantial than the one claimed here turn on the forum chosen by the taxpayer to litigate his tax liability. For example: suits for refund of taxes in a district court may be tried before a jury as a matter of right,[39] whereas there is no right to a jury trial in

[38] *Sweet* v. *Commissioner*, 120 F. 2d 77 (C. A. 1st); *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243 (C. A. 1st); *Monjar* v. *Commissioner*, 140 F. 2d 263 (C. A. 2d); *White's Will* v. *Commissioner*, 142 F. 2d 746 (C. A. 3d); *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C. A. 5th); *McCarthy* v. *Commissioner*, 139 F. 2d 20 (C. A. 7th); *Swall* v. *Commissioner*, 122 F. 2d 324 (C. A. 9th), certiorari denied, 314 U. S. 697; *Crews* v. *Commissioner*, 120 F. 2d 749 (C. A. 10th), certiorari denied, 314 U. S. 664. Compare *Reo Motors* v. *Commissioner*, 219 F. 2d 610 (C. A. 6th); and *La Floridienne J. Buttgenbach & Co.* v. *Commissioner*, 63 F. 2d 630 (C. A. 5th), discussed (*infra*, pp. 39–42). See also *Lentin* v. *Commissioner*, 237 F. 2d 5 (C. A. 7th).

[39] 28 U. S. C., Sec. 2402; Act of July 16, 1952, c. 892, 66 Stat. 735, Sec. 3.

the Tax Court;[40] equitable recoupment in tax cases, if available at all as a judicial remedy,[41] may be resorted to only in district court actions,[42] not in Tax Court proceedings.[43]

The scope of review on appeal of Tax Court cases was for years substantially more limited than the scope of review of district court tax cases.[44]

There are also disadvantages in litigating tax cases in the district courts. The proposed deficiency must be paid in advance. The time within which to appeal is sixty days in district court actions,[45] whereas three months are allowed in Tax Court proceedings.[46]

Clearly, therefore, a taxpayer's rights may be substantially different, depending on where the litigation is brought. The point is that Congress has allowed taxpayers to choose the forum in which to litigate tax liability. These taxpayers have chosen the Tax Court with its corresponding advantages, and they are bound by any disadvantages that may be involved.

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[40] See Secs. 1100–1146 of the 1939 Code.

[41] See *McEachern* v. *Rose*, 302 U. S. 56. Compare Sec. 3801 of the 1939 Code.

[42] *Bull* v. *United States*, 295 U. S. 247.

[43] *Commissioner* v. *Gooch Co.*, 320 U. S. 418.

[44] The rule of *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231, was modified by statute, Act of June 25, 1948, c. 646, 62 Stat. 869, Section 36, amending Section 1141 (a) of the 1939 Code, now Section 7482 of the 1954 Code, so that Tax Court decisions are now reviewable "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."

[45] Rule 73 (a), Federal Rules of Civil Procedure.

[46] § 1142 of the 1939 Code.

II

EVEN IF IT BE ASSUMED THAT IN CASES OF FRAUD OR LIKE EXTRAORDINARY CIRCUMSTANCES JURISDICTION TO REOPEN A FINAL TAX COURT DECISION EXISTS DESPITE SECTION 1140, NO SUCH CIRCUMSTANCES WERE PRESENT HERE

Section 1140 is by its terms absolute and reflects a determination by Congress that the need for ultimate finality in Tax Court cases outweighs any occasional hardship which may result from precluding further consideration of past decisions. However, we recognize that unique considerations are operative where a decision is based upon fraud [47] and emphasize that the Court is not called upon in this case to determine whether such a decision may be reopened after the interval specified in Section 1140.[48]

There is no claim here of fraud. Indeed it is plain that taxpayers' failure to recognize that the time to file petitions for review was running was due to no fault of the Tax Court or the Commissioner.[49]

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[47] It has been held that where fraud has influenced a decision, more than an injury to a private party is involved; the wrong is against the institutions set up to protect society. See *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238; *Simon* v. *Southern Railway*, 236 U. S. 115; *United States* v. *Throckmorton*, 98 U. S. 61.

[48] Section 272 (f) of the 1939 Code (Section 6212 (c) (1) of the 1954 Code), treating of the procedure in the case of deficiencies, denies to the Commissioner the right to determine an additional deficiency with respect to the same taxable year "except in the case of fraud" (and except for his assertion of increased deficiencies before the Tax Court (Section 272 (e)) or for jeopardy assessments) once the taxpayer has filed a petition with the Tax Court. See also S. Rep. No. 52, 69th Cong., 1st Sess., p. 26, *supra*, p. 25.

[49] Cf. *Nelson* v. *New York City*, 352 U. S. 103, 108.

A copy of each of the decisions of April 8, 1954, actually was served by registered mail upon the first counsel of record for the taxpayers. (R. 102–103, 114.) Apparently it is the practice of the Tax Court to serve copies of decisions and under its rules where a party is represented by more than one counsel service is made only upon counsel whose appearance was first entered of record.[50]

Unfortunately the copy of the decision did not actually come to the attention of the proper parties in the office of taxpayers' counsel until after the expiration of the three-months period (R. 102–103, 114). However, no explanation appears for the failure of counsel or associate counsel to recognize from the explicit direction in the opinion that "Decisions will be entered for the respondent" (R. 92), that the decisions would be entered forthwith as no computation under Rule 50 was requisite.[51] Indeed, since the opinion also expressly declared (R. 92) that "The

[50] Rules of Practice before the Tax Court (Rev. November, 1952):

RULE 22.—SERVICE

* * * * *

(b) Upon first counsel of record.—Service upon any counsel of record will be deemed service upon the party, but, where there are more than one, service will be made only upon counsel for petitioner whose appearance was first entered of record—unless the first counsel of record, by writing filed with the Court, designates other counsel to receive service, in which event service will be so made.

[51] For an exposition by the Tax Court judge of the practices of the Tax Court, with respect to the entry and service of opinions and decisions, see R. 376–381.

respondent's determination is sustained", it was further apparent that the Commissioner's determination, as stated in the deficiency notice, was sustained, and no further computation was necessary. Entry of the decisions under this opinion was clearly a *pro forma* matter.

In particular, it is significant that counsel made no inquiry of the Tax Court about the status of the proceeding until July 20, 1954, after the expiration of the three-months period (R. 102, 104–105), although they knew of the findings of fact and opinion as early as April 14. (R. 95–96, 101.) See pp. 4–5, *supra*. The present counsel for taxpayers admitted at the hearing on the motion to vacate, in response to a question by the Tax Court judge, that he was unable to explain why the Clerk of the Tax Court had not previously been asked about the entry of the decisions. (R. 126–128.) See pp. 5–6, *supra*.

In any event, the statute nowhere makes limitation of the time for filing a petition for review or for fixing the date of finality of the Tax Court decision depend upon service of a decision or notice to taxpayer or his counsel of entry of decision. Section 1142 confers jurisdiction to review a Tax Court decision on a Court of Appeals, if a petition for such review is filed by either the Commissioner or taxpayer "within three months after the decision is *rendered*."[52] [Italics supplied.] Section 1140, pre-

[52] A decision is "held to be rendered upon the date that an order specifying the amount of the deficiency is entered" (Section 1117 (c), Appendix, *infra*, p. 51), here April 8, 1954. (R. 92–93.)

scribing when a Tax Court decision becomes final insofar as here pertinent, provides that the decision shall become final upon "the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time * * *". Notwithstanding the practice of the Tax Court to serve the first counsel of record with a copy of a decision and the circumstance that such service actually here occurred, the limitation on time for review is in no sense conditioned upon such service or notice to counsel; the statute clearly fixes the date from the actual rendition of the decision.

In cases like the present one, where either the Commissioner or the taxpayers[53] have asserted that failure to seek relief within the period prescribed by Sections 1140 and 1142 of the Internal Revenue Code (Appendix, *infra*, pp. 52–54) was due to failure to receive notice of the Tax Court's decision or because of reliance upon counsel, it has been held that the Tax Court was without jurisdiction over its decision after it had become final under the statute. *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C. A. 5th); *Swall* v. *Commissioner*, 122 F. 2d 324 (C. A. 9th), certiorari denied, 314 U. S. 697; *McCarthy* v. *Commissioner*, 139 F. 2d 20 (C. A. 7th); *Monjar* v. *Commissioner*, 140 F. 2d 263 (C. A. 2d). And, while it is apparent that there can be no claim here that fraud or other extraordinary circumstances warranted reopening the

[53] Section 1140 has, of course, been applied against the Commissioner as well as against taxpayers. *Helvering* v. *Northern Coal Co.*, 293 U. S. 191; *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C. A. 5th); *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243 (C. A. 1st).

Tax Court decisions, it should be noted that in the two cases where "final" Tax Court decisions were reopened, such factors were present. In *La Floridienne J. Buttgenbach & Co.* v. *Commissioner,* 63 F. 2d 630 (C. A. 5th), taxpayer, an alien corporation, was represented by "a layman inexperienced in tax matters" who, after conferring with an agent of the Bureau of Internal Revenue in charge of the case, entered into a stipulation which the Commissioner later conceded embodied a mutual mistake. Although a decision of the Board of Tax Appeals predicated upon this stipulation had become final under Section 1005,[54] the Court of Appeals for the Fifth Circuit vacated the order of the Board, writing at p. 631:

> * * * We rest here upon two extraordinary circumstances. The first is that the order to be vacated is not really a judgment of the Board representing its ascertainment of facts and application of the law to them, but is the agreement of the parties put into the form of a judgment, the order so reciting. The Board itself has on the face of its record never ascertained what, if any, taxes the taxpayer owed. The second circumstance is that both parties to the agreement are saying that the stipulation behind the order rests on a false and mistaken basis, and, if the order stands, it operates as a fraud arising out of the confidence that the inexperience of one party put in the knowledge and experience of the other. However unintended the advantage taken of the taxpayer, the Commissioner does not wish to retain it.

[54] See footnote 27, *supra*, p. 24.

Although the court's action in *Buttgenbach* in vacating the Board's order is doubtless in part attributable to the willingness of both parties to have the Board assume jurisdiction and correct its prior decision, the correctness of this result is subject to serious doubt, for, as the Court of Appeals in the instant case noted (R. 480):

> Though parties may stipulate to the jurisdiction of the *person,* they may not do so as to the *subject matter.*

The court below also noted (R. 480) that the *Buttgenbach* case was decided before the *Northern Coal Co.* decision of this Court. Compare the later decision of the Fifth Circuit in *Commissioner* v. *Realty Operators, supra.*[55] Apart from this, it is apparent that the only principle that can be derived from *Buttgenbach*, even if it be assumed *arguendo* that the decision has any present validity, is that an exception to Section 1140 finality may exist where fraud, or circumstances closely analogous to fraud, influenced the decision.

This too is all that may be derived from the decision of the Sixth Circuit in *Reo Motors* v. *Commissioner,* 219 F. 2d 610. Like *Buttgenbach, Reo* involved a stipulation. There the Commissioner and taxpayer had stipulated that the Commissioner's computation of taxpayer's excess profits credit was cor-

[55] It may be added that the *Buttgenbach* case has been questioned or distinguished by several other circuits. *Sweet* v. *Commissioner,* 120 F. 2d 77, 81 (C. A. 1st); *Monjar* v. *Commissioner,* 140 F. 2d 263, 265 (C. A. 2d); *White's Will* v. *Commissioner,* 142 F. 2d 746, 748, 749 (C. A. 3d). And in *Swall* v. *Commissioner,* 122 F. 2d 324, 325, the Ninth Circuit considered that the *Buttgenbach* case was in effect overruled by the *Northern Coal Co.* case.

rect. In its application for extraordinary relief, taxpayer alleged (p. 611) that:

> because of a mutual mistake of fact, an error had been made in the stipulation of its excess profits credit resulting from the omission from its invested capital of more than two million dollars paid in for stock; that if the correct excess profits credit had been used there would have been no deficiency in petitioner's excess profits tax for 1942; that the Commissioner had admitted this error in connection with another proceeding involving petitioner's excess profits tax liability for 1943; * * *

The Tax Court summarily denied taxpayer's application for relief and the Sixth Circuit reversed, holding that the Tax Court has power in extraordinary circumstances to vacate and correct its decisions, even after these have become final. This power, the court held, was similar to the jurisdiction of a court to grant a writ of error *coram nobis* and in remanding to the Tax Court, the Sixth Circuit expressed no view as to whether the circumstances in the case were so extraordinary as to invite the exercise of that power. Again, whether or not the *Reo* case was correctly decided, the circumstances there of mutual mistake of fact in entering into a stipulation upon which the decision of the Tax Court had allegedly been based, were certainly entirely different from the facts here.

Indeed, in the *Reo Motors* case the taxpayer additionally alleged (p. 611):

> that in 1949 the petitioner had sought relief from its excess profits tax for the year 1942

> under § 722 of the Internal Revenue Code of 1939, 26 U. S. C. § 722, in response to which the Commissioner had contended that no § 722 relief could be given because the allowance of the petitioner's proper credits would result in no excess profits tax liability for the year 1942, making inapplicable the relief provisions of § 722.

The court therefore noted (p. 612) that:

> The petitioner points out that the Commissioner not only concedes this factual error, but is seeking to take advantage of it to the detriment of the petitioner in resisting petitioner's claim under § 722.

By contrast here the Commissioner was not at all at fault and was in no sense a party to the error or inadvertence.

United States v. *Morgan*, 346 U. S. 502, and *United States* v. *Mayer*, 235 U. S. 55, which discuss the circumstances under which a court may grant a writ of error *coram nobis*, show that even if the Tax Court has power to grant such writs, no extraordinary situation calling for issuance of the writ is presented here.[56] By contrast, all that the Tax Court here asserted as the ground for exercise of power to grant "extraordinary relief" (R. 138) was

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[56] In the *Mayer* case, this said (p. 69):

> This [*coram nobis*] jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid.

See also *United States* v. *Morgan*, 346 U. S. at 507, fn. 9.

"to enable the petitioner to present new and additional evidence" and to enable the court to reconsider the issue to determine whether it had made any erroneous findings or legal conclusions. These bore no resemblance to possible "fundamental" errors, affecting the regularity and validity of the entire proceeding—*e. g.*, the failure without competent waiver to furnish the defendant in a criminal case with counsel—such as justify the grant of *coram nobis*.

Indeed, the events which prompted the rehearing here were not only outside the scope of any exception to finality which may exist in cases of fraud or other extraordinary circumstances, but they were such as to warrant affirmance of the dismissal of the petitions for review on still another ground. In *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131, 137, this Court pointed out that "[w]here it appears that a rehearing has been granted only for th[e] purpose [of extending the time for appeal] the appeal must be dismissed." This statement was quoted in *Commissioner* v. *Realty Operators*, 118 F. 2d 286, 289, and applied by the Fifth Circuit against the Commissioner and his petition for review of a Board decision was dismissed. Although the court below did not base its decision upon this principle, nevertheless, the record establishes that it has application here.

Taxpayers' original motion filed on August 24, 1954 (R. 93–94), was simply to vacate the decisions entered on April 8, 1954 (R. 94). At the full hearing, which was held on this motion on September 14 and 16, 1954

(R. 106–133), there was no suggestion that a further hearing on the merits was necessary to enable taxpayers to present new and additional evidence; substantially all that was discussed were the circumstances under which the time to file petitions for review had been permitted to lapse and the extent of the Tax Court's power nevertheless to afford an opportunity for appeal (R. 108, 111, 119–120). Indeed, it was not until October 11, 1954, that the suggestion first was made that the Tax Court should vacate the April decisions for the purpose of granting taxpayers a rehearing on the merits and that the original motion to vacate filed in August be amended by adding a request for a rehearing. (R. 133, 134.) If taxpayers believed that the justice of their cause required the taking of additional evidence on the merits, which was the nominal reason for vacating the decisions and for the rehearing, it is not explained why they waited for approximately six months after receiving the Tax Court's findings and opinion before even suggesting to the Tax Court the need for a rehearing; nor is it explained why in the original motion to vacate, and in the course of the discussion at the hearing on that motion, no relief by way of opportunity to adduce additional evidence on the merits was sought. Concededly, taxpayers at all times were aware of the Tax Court's findings and opinion. There was no requirement that taxpayers await the Tax Court's decisions before moving for rehearing, if in fact the alleged extraordinary need existed for adducing additional evidence. On the contrary, the Tax

Court's rules provided (Rule 19 (e) (Rev. November, 1952)) that "No motion for rehearing, further hearing, or reconsideration may, except by special leave, be filed more than 30 days after the *opinion* has been served * * *."[57] [Italics supplied.]

Moreover, the record shows that at the conference of April 14, 1954, attended by taxpayer Jesse Lasky and his attorneys, there was no suggestion of a need, extraordinary or otherwise, to adduce additional evidence. (R. 96, 99, 101–102, 103–104.) Further, the showing made to the Tax Court was not such as would justify even granting a new trial on the basis of newly discovered evidence—had the motion been timely—for the evidence offered (R. 484–486) was merely cumulative and was not such as by due diligence could not have been adduced at the original hearing (R. 138–144).

The inference seems compelling that the October 11, 1954, amendment to the August motion to vacate "for the purpose of granting petitioners a rehearing of the case on its merits" (R. 134) was an afterthought for the purpose of extending the time for appeal and that the rehearing was granted solely to extend the time for appeal. (See R. 375, 381–384.)

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[57] Similarly Rule 19 (e) provided that no motion to vacate a decision might, except by special leave, be filed more than thirty days after the decision had been entered. The Tax Court has, of course, for reasons stated in point I, *supra*, no jurisdiction to grant such special leave after the 30-day period for filing a motion to vacate has expired, and its decision has become final under the terms of Section 1140. See *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243 (C. A. 1st).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) [1] [as amended by the Act of December 29, 1945, c. 652, 59 Stat. 669, Sec 203] *Petition to Tax Court.*—[2] If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-

[1] Internal Revenue Code of 1954, Section 6212 (a) and 6213 (a) (26 U. S. C. 1952 ed., Supp. II, Secs. 6212 (a), 6213 (a)), contain the substance of this section.

[2] Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 504. CHANGE OF NAME OF BOARD OF TAX APPEALS.

* * * * *

(c) *References.*—All references in any statute (except this section), or in any rule, regulation, or order, to the "Board of Tax Appeals" or to the "Board" when used in the sense of "Board of Tax Appeals", or to the "member", "members", or "chairman" thereof shall be considered to be made to The Tax Court of the United States, the judge, judges, and presiding judge thereof, respectively.

day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * *

(b)[3] *Collection of Deficiency Found by Tax Court.*—If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

* * * * *

(h)[4] *Final Decisions of Tax Court.*—For the purposes of this chapter the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 1140.

* * * * *

(26 U. S. C. 1952 ed., Sec. 272.)

SEC. 273. JEOPARDY ASSESSMENTS.

* * * * *

(e)[5] *Expiration of Right to Assess.*—A jeopardy assessment may not be made after the de-

[3] Internal Revenue Code of 1954, Section 6215 (a) (26 U. S. C. 1952 ed., Supp. II, Sec. 6215 (a)), is substantially the same.

[4] Internal Revenue Code of 1954, Section 6214 (c) (26 U. S. C., 1952 ed., Supp. II, Sec. 6214 (c)), is substantially the same.

[5] Internal Revenue Code of 1954, Sec. 6861 (e) (26 U. S. C. 1952 ed., Supp. II, Sec. 6861 (e)), is substantially the same.

cision of the Tax Court has become final or after the taxpayer has filed a petition for review of the decision of the Tax Court.

* * * * *

(26 U. S. C. 1952 ed., Sec. 273.)

SEC. 277.[6] SUSPENSION OF RUNNING OF STATUTE.

The running of the statute of limitations provided in section 275 or 276 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under section 272 (a)) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for sixty days thereafter.

(26 U. S. C. 1952 ed., Sec. 277.)

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(c)[7] *Effect of Petition to Tax Court.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Tax Court within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Tax Court which has become final; and

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[6] Internal Revenue Code of 1954, Sec. 6503 (a) (1) (26 U. S. C. 1952 ed., Supp. II, Sec. 6503 (a) (1)), is substantially the same.

[7] Internal Revenue Code of 1954, Sec. 6512 (a) (26 U. S. C. 1952 ed., Supp. II, Sec. 6512 (a)), is substantially the same.

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Tax Court which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

* * * * *

(26 U. S. C. 1952 ed., Sec. 322.)

SEC. 1100 [8] [As amended by Sec. 504 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. STATUS.

The Board of Tax Appeals (hereinafter referred to as the "Board") shall be continued as an independent agency in the Executive Branch of the Government. The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of The Tax Court of the United States.

(26 U. S. C. 1952 ed., Sec. 1100.)

SEC. 1113. [9] SERVICE OF PROCESS.

The mailing by registered mail of any pleading, decision, order, notice, or process in respect of proceedings before the Tax Court shall be held sufficient service of such pleading, decision, order, notice, or process.

(26 U. S. C. 1952 ed., Sec. 1113.)

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[8] Internal Revenue Code of 1954, Sec. 7441 (26 U. S. C. 1952 ed., Supp. II, Sec. 7441), is substantially the same.

[9] Internal Revenue Code of 1954, Sec. 7455 (26 U. S. C. 1952 ed., Supp. II, Sec. 7455), is substantially the same.

SEC. 1117.[30] REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. The decision shall be made by a member in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

(b) *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions and memorandum opinions.

(c) *Date of Decision.*—A decision of the Tax Court (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court. If the Tax Court dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Tax Court dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Tax Court, and the decision of the Tax Court shall be held to be rendered upon the date of such entry.

* * * * *

(26 U. S. C. 1952 ed., Sec. 1117.)

[30] Internal Revenue Code of 1954, Sec. 7459 (a), (b) and (c) (26 U. S. C. 1952 ed., Supp. II, Sec. 7459 (a), (b) and (c)), is substantially the same.

SEC. 1140.[11] DATE WHEN TAX COURT DECISION BECOMES FINAL.

The decision of the Tax Court shall become final—

(a) *Petition for Review Not Filed on Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(b) *Decision Affirmed or Petition for Review Dismissed.*—

(1) *Petition for certiorari not filed on time.*—Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(2) *Petition for certiorari denied.*—Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(3) *After mandate of Supreme Court.*—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Tax Court be affirmed or the petition for review dismissed.

(c) *Decision Modified or Reversed.*—

(1) *Upon mandate of Supreme Court.*—If the Supreme Court directs that the decision of the Tax Court be modified or reversed, the decision of the Tax Court rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the man-

[11] Internal Revenue Code of 1954, Sec. 7481 (26 U. S. C. 1952 ed., Supp. II, Sec. 7481), is substantially the same.

date, in which event the decision of the Tax Court shall become final when so corrected.

(2) *Upon mandate of the Circuit Court of Appeals.*—If the decision of the Tax Court is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Tax Court rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Tax Court was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected.

(d) *Rehearing.*—If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Tax Court for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Tax Court rendered upon such rehearing shall become final in the same manner as though no prior decision of the Tax Court had been rendered.

(e) *Definitions.*—As used in this section.—

(1) *Circuit Court of Appeals.*—The term "Circuit Court of Appeals" includes the United States Court of Appeals for the District of Columbia;

(2) *Mandate.*—The term "mandate," in case a mandate has been recalled prior to the ex-

piration of 30 days from the date of issuance thereof, means the final mandate.

(26 U. S. C., 1952 ed., Sec. 1140.)

SEC. 1142.[12] PETITION FOR REVIEW.

The decision of the Tax Court rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Tax Court prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered.

(26 U. S. C. 1952 ed., Sec. 1142.)

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[12] Internal Revenue Code of 1954, Section 7483, reads as follows:

SEC. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.

(26 U. S. C. 1952 ed., Supp. II, Sec. 7483).

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